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U.S. arms export system: policy, practices & contacts

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The United States views the transfer of conventional arms and other defense articles and services as an integral part of its national security, arms control, and foreign policies. Applied judiciously, foreign arms transfers can help meet the legitimate defense needs of friendly countries, deter aggression, and foster regional stability, thus promoting regional and international security and the peaceful resolution of disputes. Mindful of the potentially adverse consequences of indiscriminate international arms transfer, the United States strictly regulates arms exports and reexports and has a genuine interest in arms transfer restraint. The U.S. has initiated and participates in several international efforts related to arms transfer restraint, and remains prepared to consider other realistic proposals directed toward that end.

There are two channels by which the United States exports arms: the government-to-government security assistance program managed by the Department of Defense under the policy guidance of the Department of State; and, through private or direct commercial arms exports licensed by the Department of State. The legal, policy, and regulatory bases of U.S. arms transfers are elaborate, comprehensive, and transparent.

Security Assistance. U.S. government-to-government programs are conducted under statutory authority of the Foreign Assistance Act of 1961, as amended, and the Arms Export Control Act (AECA), as amended. They consist of foreign military sales (FMS), the Foreign Military Financing Program (FMF), and the Excess Defense Articles Program (EDA). FMS transfers may take the form of cash or FMF, the latter extended by the Department of Defense as grants of concessional rate loans that may be used to procure defense articles, defense services, and design and construction services from the military departments or directly from U.S. commercial suppliers. EDA are defense articles declared "excess" to Department of Defense needs and sold to foreign governments at reduced prices based on age and condition. Although FMS traditionally has been the main vehicle for U.S. arms transfers, commercial arms sales have been increasing in value relative to FMS.

Commercial Arms Exports. Direct commercial sales of U.S.-origin defense products, components, technologies and services are governed by the Arms Export Control Act and implemented under the International Traffic in Arms Regulations (ITAR). Control over the export of defense articles and services is exercised through a comprehensive export licensing system administered by the State Department's Office of Defense Trade Controls, formerly the Office of Munitions Control.

The essential features of the U.S. export system include:

The U.S. Munitions List. The Arms Export Control Act provides for the President to designate which commodities shall be deemed to be defense articles and defense services. Such designated defense articles and services constitute the U.S. Munitions List (USML), which is contained in the ITAR. The designation of defense articles and services is based primarily on whether the article or service is deemed to be inherently military in character. Such articles may be further designated as "significant military equipment" for which special export controls are warranted because of the capacity for substantial military utility or capability. USML articles are subject to ITAR controls and regulated by the Department of State.

The ITAR defines defense services as:

> (a) The furnishing of assistance, including training to foreign persons in the design, engineering, development, production, processing, manufacture, use, operation, overhaul, repair, maintanance, modification, or reconstruction of defense articles, whether in the United States or abroad; or (b) the furnishing to foreign persons of any technical data, whether in the United States or abroad.

Technical Data. The extent to which the U.S. controls technical data exports is probably unique among the world's leading exporters. Any exporter who wishes to export technical data pertaining to any article covered by the United States Munitions List must receive prior licensing approval from the Office of Defense Trade Controls (DTC).

Technical data is information "directly related" to the design, production, use, repair, or modification of defense articles. It does not include information concerning general scientific principles commonly taught in academia. It also does not include base marketing information on function or purpose or general system description of defense articles. The export of technical data is regulated regardless of whether the data is transmitted by phone, written correspondence, telex, fax, or in person conversation.

There are certain licensing exemptions for the export of technical data. They include:

--Technical data to be disclosed pursuant to an official written request or directive from the U.S. Department of Defense;

--Technical data in furtherance of a manufacturing license or technical assistance agreement approved by DTC;

--Technical data sent by a U.S. corporation to its U.S. person-employee or to the USG;

--Technical data in the form of basic operations, maintenance, and training information relating to a defense article lawfully exported or authorized for export to the same recipient;

--Technical data approved for public release, even if unpublished, by the cognizant U.S. agency.

Arms Export Licensing System. Central to the regulation of commercial arms exports is the licensing system administered by the Department of State's Office of Defense Trade Controls (DTC). Commercial firms and private individuals engaged in the manufacture or export of U.S.-origin defense articles and services must register with DTC. All U.S. persons must seek approval from DTC to export any item or service covered by the USML, unless the export is specifically exempted under the ITAR. In some instances, non-transfer and end use assurances are required of end-users and appropriate authorities in charge of monitoring legal transactions of the private sector. U.S. law provides for sanctions in the event of violations of export regulations.

Decisions to approve or deny arms export license applications are considered on a case-by-case basis and subject to an intra-governmental review and coordination process. A broad range of factors is taken into account, including:

-- the stated end-use and end-user of the equipment or services;

-- whether the transfer is consistent with U.S. national security, foreign policy and international obligations;

-- whether it will contribute to or adversely affect regional security and stability;

-- the recipients legitimate defense requirements;

-- whether the proposed transfer can be absorbed without overburdening the recipient's military support system or financial resources; and,

-- whether other legal and policy requirements (e.g., arms control and human rights) are satisfied.

Retransfer/Re-Export. Persuant to ITAR § 123.9(a), the country designated as the ultimate destination on an export license application or on a shipper's export declaration must be the country of ultimate end-use. The prior written approval of the Department of State must be obtained before reselling, diverting, transferring, transhipping, or disposing of a defense article in any country other that the country of ultimate destination as stated on the export license, or on the shipper's export declaration in cases where an exemption is claimed.

In addition, § 123.10 of the ITAR requires that an application for a license to export significant military equipment (as defined in § 120.19 of the ITAR) must be accompanied by a non-transfer and use certificate (Form DSP-83) at the time of submission to the Office of Defense Trade Controls. This form is to be executed by the foreign consignee and foreign end-user. The certificate stipulates that the foreign consignee and foreign end-user will not re-export, resell or otherwise dispose of the significant military equipment enumerated in the application outside the country named as the location of the foreign end-use, without the prior written approval of the Department of State.

Enforcement Operations. Export control enforcement efforts are both preventive and reactive and can be either administrative or judicial. Under the authority of ITAR, any license or other approval may be suspended, revoked, denied or amended without prior notice whenever DTC believes that applicable laws and regulations have been violated. Reported and attempted violations of the ITAR are investigated in coordination with appropriate offices and agencies. By long-standing interdepartmental agreement, the U.S. Customs Service conducts actual investigations of alleged violations. DTC coordinates with and assists Customs and other law enforcement authorities in conducting their investigations. DTC also assists in consulting the Department of Justice if criminal procedings are to occur. Enforcement actions range from detention and seizure of suspect shipments to criminal prosecution of firms and individuals. Commercial firms or individuals convicted of violating the ITAR can be debarred from participating in the export of defense articles and services, as well as the transfer of technical data for a

period up to three years. They may also be subject to criminal and civil fines as well as imprisonment.

Legislative Oversight. Congressional interest in, and oversight of the Security Assistance and Commercial Arms Sales Programs is extensive. The Congress is able to oversee these programs through the statutory reporting requirements which are mandated by the AECA. The AECA also provides for Congressional notification prior to the issuance of certain types of licenses. This includes the export of major defense equipment valued at $14 million or more, or the export of any defense articles or services valued at $50 million or more. Similar certification is required before approval of technical assistance or manufacturing license agreements that involve the manufacture abroad of significant military equipment to any country except NATO members. Additionally, Congress must be provided with an annual estimate of anticipated approval during the current calendar year.

Transparency of U.S. Arms Transfers. The previously mentioned statutory Congressional notifications are matters of public record, and contribute to the openness and transparency of the U.S. arms export program. By statute, the President is also required to submit an annual budget request for Security Assistance Programs which is generally presented in Open testimony and published as the Congressional Presentation for Security Assistance Programs. Furthermore, the U.S. Defense Security Assistance Agency publishes the implementation guidance for the Security Assistance Program in the Security Assistance Management Manual, and also publishes annual comprehensive reports entitled Fiscal Year Series and Foreign Military Sales, Military Construction Sales and Military Assistance Facts; and the U.S. Agency for International Development annually publishes U.S. Overseas Loans and Grants and Assistance from International Organizations, including country-by-country military assistance program data. Finally, the U.S. Arms Control and Disarmament Agency's (ACDA) annual publication, World Military Expenditures and Arms Transfers, is designed to provide comprehensive public information on international arms transfers. Such transparency, we believe, can contribute to international confidence by increasing regional stability and restraining destabilizing arms sales.